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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Streamlining Broadcast EEO	)	
Rules and Policies, Vacating the EEO	)	MM Docket No. 96-16
Forfeiture Policy Statement	)	
And Amending Section 1.80 of	)	
The Commission's Rules to Include	)	
EEO Forfeiture Guidelines	)	

COMMENTS OF NATIONAL RELIGIOUS BROADCASTERS

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COMMENTS OF NATIONAL RELIGIOUS BROADCASTERS

National Religious Broadcasters ("NRB") hereby submits its comments on the Commission's *Notice of Proposed Rulemaking* ("*Notice*") in the above-captioned proceeding.[1/] NRB is a national association of radio and television broadcasters and programmers whose purpose is to "foster and encourage the broadcasting of religious programming."[2/]

[1/] *Order and Notice of Proposed Rulemaking*, MM Docket No. 96-16, FCC 96-49 (released February 16, 1996).

[2/] National Religious Broadcasters, *Directory of Religious Broadcasting*, at 14 (1992-93). The particular EEO rule addressed in these comments -- the so-called *King's Garden* policy, set forth in *In re King's Garden, Inc.*, 34 F.C.C. 2d 937 (1972) -- has a direct impact on the Commission licensees among NRB's members, as well as religious stations not represented by NRB. More than 1,300 radio stations provide full-time religious programming. "Lawyers Buy Cleveland Radio Station, Switch to All-Catholic Programming," *Washington Post*, B7 (April 29, 1995).

I. INTRODUCTION AND SUMMARY

In seeking to "improve" and "clarify" the equal employment opportunity ("EEO") requirements imposed on broadcast licensees, the Commission has expressed concern that certain of its EEO rules and policies may unnecessarily burden broadcasters, particularly "smaller stations and other distinctly situated broadcasters."[3/] NRB welcomes the Commission's general recognition that certain situations warrant reconsideration and modification of some EEO obligations. These comments focus on one such set of circumstances -- the legitimate need of religious broadcasters to hire and promote employees who hold beliefs in accord with the broadcaster's religious views.

NRB urges that the limited exemption to the Commission's religious discrimination prohibition now afforded under the *King's Garden* policy be expanded to parallel the treatment accorded to religious entities generally under the nation's fundamental EEO statute, Title VII of the Civil Rights Act of 1964 ("CRA") as amended. Recast as a bright-line FCC rule patterned on Section 702 of the CRA, the new Commission EEO regulation would permit religious broadcasters to establish religious belief or affiliation as a *bona fide* occupational qualification ("BFOQ") for all station employees.

As explained below, such a reformed rule applicable to all religious station employees would better accommodate the legitimate needs and desires of religious broadcasting organizations in ordering their internal affairs, including the need to ensure that employees share a common commitment to the licensee's views and mission. It also would free the

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[3/] *Notice* at ¶ 1.

Commission from becoming unnecessarily entangled in analyzing and categorizing the tasks performed by the various employees of religious licensees.

Furthermore, expanding the exemption to cover all employees would avoid the serious questions of statutory authority that are raised by the FCC's current policy. The discussion below notes that the Commission specifically modeled its *King's Garden* policy on the Title VII provision then applicable to religious entities -- a statutory provision that Congress later amended to more broadly accommodate the free exercise rights of religious organizations. Moreover, the appellate court that upheld *King's Garden* did so in large measure because it believed that the related Title VII amendment was unconstitutional -- a position that the Supreme Court later rejected. Thus, the *King's Garden* policy today lacks much of the legal foundation upon which it was built.

Expanding the exemption to a bright-line rule allowing religious broadcasters to adopt religious beliefs as a BFOQ for all station jobs would not (and, NRB firmly believes, should not) undermine the Commission's EEO efforts with respect to minorities and women. Under the expanded exemption that NRB proposes, religious licensees would remain fully subject to the FCC's ban on racial and gender discrimination. NRB does not advocate and would not support the use of the expanded exemption as a subterfuge for illicit discrimination against women and minorities.

II. Religious Broadcasters Should Be Allowed To Establish Religious Belief Or Affiliation As A Bona Fide Occupational Qualification For All Positions At Their Stations

The current policy partially exempting religious broadcasters from the Commission's general ban on employment discrimination based on religious belief or affiliation was formulated by the FCC and passed on by the courts more than 22 years ago.[4/] The FCC itself, when deciding *King's Garden* in 1972, consciously tailored its limited exemption "[i]n keeping with the exemptions" then applicable to religious entities under the nation's general equal employment opportunity statute, Title VII of the CRA.[5/] At that time, exemptions within Section 702 of the CRA allowed religious organizations to treat religious beliefs or affiliation as a "*bona fide* occupational qualification" only when positions involved "religious activities."[6/] Accordingly, the FCC followed Congress's lead and limited its exemption for religious broadcasters to "those persons hired to espouse a particular religious philosophy over the air."[7/]

However, within months of the *King's Garden* decision, Congress expanded the relevant Title VII exemption to permit religious entities to take account of religious belief or

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[4/] *In re King's Garden, Inc.*, 34 F.C.C. 2d 937 (1972), *aff'd sub nom.*, *King's Garden v. F.C.C.*, 498 F.2d 51 (D.C. Cir.), *cert. denied*, 419 U.S. 996 (1974).

[5/] 34 F.C.C. 2d at 938.

[6/] *Id.*

[7/] *Id.*

affiliation when hiring or promoting employees for any of the organization's activities.[8/] The *King's Garden* policy that reached the appellate court continued to reflect the earlier, more restrictive Title VII exemption that Congress had rejected. In reviewing the Commission decision, the U.S. Court of Appeals for the D.C. Circuit agreed that positions at a religious licensee's station were properly exempted from the FCC's anti-bias regulations where the employment related to the espousal of the licensee's religious views.[9/] But the court declined to order the FCC to extend a broader exemption to positions that "ha[ve] no substantial connection with program content, or where the connection is with a program having no religious dimension."[10/]

This narrow view of the legitimate rights and needs of religious licensees came during a period when the Supreme Court's interpretation of the Establishment Clause was at its most expansive.[11/] Indeed, based on the precedent then before it, the D.C. Circuit in *King's Garden* expressed certainty that the Congress' 1972 expansion of the Title VII exemption was unconstitutional.[12/] That certainty has proved to be unfounded.[13/] In the two decades that

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[8/] Equal Employment Opportunities Act of 1972, P.L. 92-261, 86 Stat. 103 (modifying 42 U.S.C. § 2000e-1).

[9/] 498 F.2d at 60-61.

[10/] *Id.* at 61.

[11/] *See, e.g., Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

[12/] The court recognized that its decision was not immutable, particularly if "problems of application" with the newly formed rule arose. *King's Garden*, 498 F.2d at 61. However, such problems, reasoned the court, "will be questions for another day." *Id.*

[13/] *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 342 (1987).

have passed since the *King's Garden* was decided, the Supreme Court has come to recognize that the government may accommodate the exercise of religious rights more broadly than was acknowledged under the view prevailing at the time of *King's Garden* -- and, in so doing, has specifically affirmed the constitutionality of the broadened exemption for religious entities now embodied in Title VII.[14/] Furthermore, Congress itself, through passage of the Religious Freedom Restoration Act ("RFRA"), has intervened to ensure that the exercise of First Amendment religious rights is not unnecessarily diminished by state or federal governmental policies.

RFRA reflects Congress's interest in government accommodation of free exercise rights to the fullest extent possible under the Constitution. It bars government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability."[15/] A government agency can escape the RFRA mandate only where it can show that the particular burden placed on the exercise of religion (1) furthers a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling interest.[16/]

The Commission therefore faces a heavy task in showing why it should continue to burden the free exercise rights of religious broadcasters by subjecting them to any religious

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[14/] *See, e.g., id.*; *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Church of the Lukumi Babalu Aye, Inc., et al. v. City of Hialeah*, 508 U.S. 520 (1993); *Rosenberger v. Rector and Board of Visitors of the University of Virginia*, 115 S. Ct. 2510 (1995).

[15/] 42 U.S.C. § 2000bb-1(a).

[16/] 42 U.S.C. § 2000bb-1(b).

non-discrimination requirement with respect to employment practices. To justify the *King's Garden* policy as it now stands, the FCC would have to demonstrate a compelling interest in requiring religious stations to open non-"espousal" positions to persons who may be hostile to the religious views of the licensee. But the Commission's only legitimate justification under the Communications Act for imposing any EEO obligation at all is the anticipated benefits of the regulation on program diversity -- a goal that cannot, by definition, be served in any substantial way by a regulation that applies only to employment of non-programming personnel.[17/] Even assuming *arguendo* that the FCC could muster some basis of authority for imposing the current *King's Garden* requirement, the agency still would have to demonstrate with record evidence that imposition of the mandate was necessary to further the Commission's stated EEO goals, and that it was the least restrictive way of accomplishing such objectives.

Moreover, as demonstrated below, the current half-measure regulatory scheme hurts religious broadcasters while needlessly entangling the FCC in deciding which employees of a particular religious station may be "connected with the espousal of the licensee's religious views."[18/] The Commission would stand on firmer ground, from both a legal and policy perspective, if it were to refashion the *King's Garden* policy as a bright-line rule that parallels the related Title VII exemption -- and thus permit religious licensees to establish religious affiliation or belief as a BFOQ for all positions at their stations.

[17/] *See infra* Section III.A.

[18/] *King's Garden*, 34 F.C.C. 2d at 938.

A. The FCC's current policy substantially burdens the rights of religious broadcasters to self-determination

Under the *King's Garden* policy, religious broadcasters may take a prospective or current employee's religious beliefs into account for hiring or promotion purposes only if a clear connection between the position and religious programming content can be justified. This regulation places many obvious burdens on a religious licensee, not the least of which is forcing it to predict how a government official may view its internal operations. For example, the categorization task itself can be difficult, particularly at small stations where individuals may be required to perform several job functions with little or no advance notice.[19/]

Most important, perhaps, the *King's Garden* policy demonstrates a profound misunderstanding of the proper function of the employee selection process in religious organizations. As many court decisions and legal scholars have noted, religious organizations have a legitimate interest in autonomy in ordering their internal affairs, including the conduct of activities undertaken as a community or collective.[20/] Section 702 of the CRA already accommodates the exercise of this particular right of religious self-

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[19/] Religious licensees are given no guidance as to by the Commission's broadcast EEO forms, or even by the codified rule itself. *See* FCC Form 395; 47 C.F.R. § 73.2080. Neither reflects the accommodation of religious broadcasters' rights now afforded under *King's Garden*.

[20/] *See, e.g.*, Tribe, *Constitutional Law*, § 14-1 at 1155 (2d ed. 1988) (attempts to deal with relationship of the state to religion "must address the fact that much of religious life is inherently associational"); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952) (holding that religious organizations as spiritual bodies have rights requiring distinct constitutional protection).

determination, even where certain activities might otherwise have been deemed "secular."[21/] NRB submits that, no less than any other religious entity, a religious broadcaster should be permitted to structure its community of employees based on adherence to particular religious beliefs or affiliation, and be able to exclude those whose views are hostile to its message and mission.[22/]

The Supreme Court has specifically recognized the legitimacy of the link between religious "community" and religious self-definition:

> For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in

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[21/] *See* 42 U.S.C. § 2000e-1.

[22/] The concept of community is central to all faiths. Communal inclination may, in fact, be the strongest factor responsible for drawing religious sects together. Without a sense of community, faith and practice lose much of their meaning. In contrast to the paradigm created by the *King's Garden* policy, the activities of individual members of religious organizations often cannot neatly be divided into religious and secular categories. To the contrary, such distinctions may be explicitly rejected:

> The body is a unit, though it is made up of many parts; and though all its parts are many, they form one body. So it is with Christ. . . . If the foot should say, "Because I am not a hand, I do not belong to the body," it would not for that reason cease to be part of the body. . . . God has arranged the parts of the body, every one of them, just as he wanted them to be. . . .
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> Now you are the body of Christ, and each one of you is a part of it. And in the church God has appointed first of all apostles, second prophets, third teachers, then workers of miracles, also those having gifts of healing, those able to help others, those with gifts of administration, and those speaking in different kinds of tongues.

1 Corinthians 12:12, 18, 27-28 (New International Version). Thus, while the *King's Garden* policy would likely not exempt station employees who fulfill certain non-espousal "administration" functions, an individual Christian station may deem such workers integral to its religious mission.

> furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.[23/]

It is now well-recognized that organizations function most effectively when all of its employees, from top management to the lowest-paid worker, understand and share a common commitment to that organization's mission. Every employee at an organization necessarily affects that entity's environment. Those who work in a religious environment can testify to the palpable difference that shared religious values bring to the manner in which people work and behave.

The *King's Garden* distinctions ignore this reality. In so doing, they effectively deprive religious broadcasters -- and only religious broadcasters -- of the ability to maintain a unified sense of organizational mission or purpose. In the real world, an employee is not divorced from a religious station's mission simply because a government agency may deem his or her job insufficiently important or too distant from program content. For better or worse, employees at all levels have an ability to affect the morale and cohesiveness of religious organizations by the beliefs they espouse and the standards of moral conduct that they maintain. Religious entities should have the right to choose employees whose behavior and beliefs are in consonance with the ethos of a particular religious environment. No

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[23/] *Amos*, 483 U.S. at 342.

religious organization should be required to employ a person who by word or deed may be actively hostile to its philosophy or moral code.[24/]

Yet while the nation's fundamental EEO law imposes no such duty on most religious entities, the *King's Garden* policy would require religious broadcasters to tolerate the anti-religious expressions or acts of certain employees, even if those actions were to hinder the licensee's operations by offending (or distracting) the licensee or its other employees.[25/] Given the constitutional imperative to afford religious entities the greatest possible autonomy in ordering their affairs, the FCC should not continue to burden religious licensees by requiring them to abide by an unnecessary and false distinction in matters of employee hiring and promotion.

B. A bright-line religious exemption like that embodied in Title VII of the 1964 Civil Rights Act would limit government entanglement in religious affairs

The *King's Garden* policy burdens not only religious broadcasters but also the Commission itself, because the policy forces the FCC to become enmeshed in overseeing a

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[24/] For example, assuming that a station janitor were deemed a non-espousal employee, the *King's Garden* rule certainly would deter -- if not prevent -- a Christian licensee from firing that janitor for denigrating the divinity of Jesus Christ. Similarly, a religious licensee whose morality forbids divorce or adultery would be incapable of holding many of its own employees to those standards. Yet Congress has properly empowered most religious organizations to take such action in furtherance of their free exercise right to self-determination. *See* 42 U.S.C. § 2000e-1; *Amos*, 483 U.S. 327.

[25/] The existing partial exemption policy also makes religious broadcasters confront the unintended consequences of a two-track career path at their stations. The rule ensures that certain employees will not be promoted within the organization because their religious views may not be consonant with the performance of the highest level management jobs.

religious station's use of its various employees. It thus presents the constitutionally unsavory picture of a government agency reviewing a religious entity's employment practices and then weighing how closely a job title or set of work duties is tied to the espousal of the entity's religious messages. Thus, the current regulation intensifies the FCC's entanglement with religious broadcasters, who are subjected to a form of scrutiny that does not apply to secular broadcasters.[26/]

A bright-line rule exempting all positions at a religious station from the agency's prohibition on religious employment discrimination would avoid the pitfalls posed by such excessive entanglement. An exemption extending to all employees would be both constitutionally permissible and simple to administer. Adhering to the current partial exemption, however, would keep the Commission in the unnecessary and constitutionally delicate business of drawing lines between "religious" and "secular" chores at a religious station.

The Supreme Court, in affirming the constitutionality of the related Title VII employment exemption for religious entities, has already recognized the value of an approach that avoids that task.[27/] As discussed in greater detail in Section II, the FCC should not dismiss out of hand the parallels between its EEO rules and policies and those which proceed under Title VII. At this juncture, however, it should be enough for the Commission to

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[26/] The FCC's case-by-case review and categorization of a religious station's employees could presumably extend over a considerable period. NRB is not aware that any court has yet validated a Commission determination as to where a particular position falls along the religious/secular hierarchy of jobs.

[27/] *Amos*, 483 U.S. 327.

recognize that it is no better equipped than is any other government entity to distinguish between the sectarian and secular activities conducted by a religious entity. As Justice Brennan explained,

> [w]hat makes the application of a religious-secular distinction difficult is that the character of an activity is not self-evident. As a result, determining whether an activity is religious or secular requires a searching case-by-case analysis. This results in considerable ongoing government entanglement in religious affairs. Furthermore, this prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity. While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community's process of self-definition would be shaped in part by the prospects of litigation. A case-by-case analysis for all activities therefore would both produce excessive government entanglement with religion and create the danger of chilling religious activity.[28/]

Because the *King's Garden* policy mandates precisely such a case-by-case analysis with all the attendant entanglement dangers, it should be refashioned to follow the approach established by Congress in Title VII. The FCC should permit religious licensees to establish religious belief or affiliation as a legitimate prerequisite for all positions at their stations -- and abandon the more restrictive exemption that unnecessarily expends Commission resources on issues outside the agency's appropriate sphere of concern.[29/]

[28/] *Amos*, 483 U.S. at 343-44 (1987) (Brennan, J., concurring) (citations omitted).

[29/] The *Amos* case also should eliminate any question as to whether the bright-line exemption advocated here would trigger an Establishment Clause problem. Like the bright-line exemption to Title VII, a similarly expanded exemption to the Commission's own EEO rules would satisfy the Constitution's requirements: First, the exemption would serve the secular purpose of preventing the government from being tempted to abandon the neutrality with which officials must treat religions/religious entities. *Id.* at

(continued...)

III. The Commission Has No Compelling Justification For Continuing To Prevent Religious Broadcasters From Recruiting, Hiring, And Promoting Station Employees On The Basis Of Religious Belief Or Affiliation

The outdated *King's Garden* policy harms religious broadcasters by denying them the fullest possible accommodation of their rights to religious self-determination, while at the same time unnecessarily entangling the FCC in the internal affairs of religious entities. Moreover, there is no compelling governmental interest that would justify retention of the old policy. And given the manner in which the current regulation operates, the statutory authority for maintaining it is even more dubious.

Furthermore, the Commission has no need, as a matter of policy, to maintain only a partial exemption to the religious non-discrimination obligation for religious broadcasters. Allowing such licensees to establish religious belief or affiliation as a BFOQ for all station jobs would not undermine the FCC's important efforts to prevent undue racial, ethnic, or gender-based discrimination and to foster greater broadcast employment opportunities for women and minorities.

[29/](...continued)
335. Second, the primary effect of an expanded FCC exemption would be neither to advance nor inhibit religion. *Id.* at 336-37. Certainly such an expanded exemption could not be mistaken for Commission endorsement of religion. The FCC, as it must, already affords religious licensees great scope to express their sectarian views over the public airwaves. Given that this accommodation is not mistaken for endorsement, extension of the exemption to off-air employees could hardly be seen -- if indeed it is "seen" at all -- as government favoritism of religion. Finally, as discussed in Section III below, limiting the exemption to only employees involved in espousal of the licensee's religious views is not necessary to advance the Commission's general EEO goals with respect to women and minorities. *See infra* Section III.A.

A. As a legal matter, the FCC has no compelling interest in forbidding religious broadcasters from requiring that employees hold particular religious views

At the time that its initial EEO rules were proposed, the Commission stated that its own employment obligations would "complement, not conflict with, action by bodies specially created to enforce" the nation's general employment policies.[30] The *King's Garden* decision itself was deliberately fashioned on the then-applicable Title VII exemptions.[31] As discussed above, however, the *King's Garden* policy is now inconsistent with the approach taken in the nation's basic equal employment opportunity statute. While Title VII generally prohibits employers from failing to or refusing to hire employees based on an individual's "religion" (among other characteristics), the law exempts a "religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[32]

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[30] *In Re Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 18 F.C.C. 2d 240, 243 (1969) ("*1969 Report & Order*").

[31] *See* 34 F.C.C. 2d at 398.

[32] 42 U.S.C. §§ 2000e-1, 2000e-2. Concerning various constitutional guarantees of individual liberty, the Supreme Court has stated that "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943). Title VII, as amended, properly "withdraws" religious organizations from the whims of federal employment laws with respect to religious employment qualifications. The FCC's EEO rules tread where Congress itself has exhibited restraint, however.

Congress thus has established that the free exercise rights of religious entities should be broadly accommodated.[33/] Even when the religious organization employs persons in "secular" positions such as management of a church gymnasium, there is no constitutional bar preventing that entity from establishing religious belief or affiliation as a BFOQ.[34/]

The FCC has no independent interest in maintaining a more restrictive regulation than the general law, because the current *King's Garden* policy cannot -- by definition -- serve the agency's goals under the Communications Act in any substantial or significant way. Both the courts and the Commission itself have recognized that the FCC has limited authority to impose EEO requirements beyond those established under Title VII. As the D.C. Circuit has said,

> EEO enforcement is not the FCC's mission. Thus, it has no obligation to promulgate EEO regulations. But it does possess the power to issue such regulations in furtherance of its statutory mandate to ensure that broadcasters serve all segments of the community.[35/]

Over the years, the Commission has relied on its general authority to grant licenses that serve the "public interest, convenience and necessity" as the basis for its power to impose an

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[33/] Nowhere in its text or legislative history does the 1972 amendment to Title VII intimate that FCC licensees are not covered under the exemption. Under the amended statute, religious licensees fall outside the general prohibition on religious discrimination either by virtue of the broad exemption or because the general prohibition applies only to employers with "fifteen or more employees." In contrast, the FCC's EEO regulations provide only a limited exemption for certain espousal employees of religious broadcasters, and the Commission's strictures apply to stations with as few as five employees. *Compare* 42 U.S.C. § 2000e(b) *with* 47 C.F.R. § 73.2080; FCC Form 396.

[34/] *Amos*, 483 U.S. 327 (Establishment Clause does not impede application of exemption to secular activities of religious organizations).

[35/] *Office of Communication of the United Church of Christ*, 560 F.2d 529, 531 (D.C. Cir. 1977) (citation omitted).

evolving set of EEO obligations.[36/] This authority is, of course, limited by the purpose for which the agency exists: "It has long been recognized that the 'public interest mandate' of a federal regulatory agency is not a broad license to promote the general welfare, and that such a mandate takes on specific content and meaning only when one carefully examines the purposes for which the agency was established."[37/]

The FCC has already recognized that the "primary" purpose of, and thus authority for, its EEO rules and policies is the beneficial effect that the presence of minorities and women station employees is expected to bring to the station's programming content. Only this direct link between employee presence and program content -- and no other justification -- has been viewed favorably by the courts.[38/]

[36/] *See In Re Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, 13 F.C.C. 2d 766, 768 (1968); *1969 Report & Order*, 18 F.C.C. 2d 240; *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 F.C.C. 2d 226, 228 (1976) ("*1976 Report & Order*"); *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunities in the Broadcast Radio and Television Services*, 2 FCC Rcd. 3974 (1987) (collectively citing 47 U.S.C. §§ 307, 309).

[37/] *1976 Report and Order*, 60 F.C.C. 2d at 299.

[38/] *NAACP v. Federal Power Commission*, 425 U.S. 662 (1975) (unlike the FPC's EEO rules, the FCC's EEO rules are justifiable as "necessary to enable the FCC to satisfy its obligation under the Communications Act . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups") (emphasis added). In more recent years, the FCC has also advanced the notion that its EEO obligations support the agency's efforts to foster greater minority and female station ownership, which in turn is believed to favorably affect programming content. *See, e.g., Notice* at ¶ 8. This justification for the EEO rules has not been analyzed by the courts, and recent precedent suggests that it may not be on solid legal ground. *See Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097 (1995) (overruling *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990)); *Lamprecht v. FCC*, 958 F.2d 328, 398 (D.C. Cir. 1992) (even under intermediate standard of review, grant of comparative preference to female applicant for broadcast license not

(continued...)

In the special context of the *King's Garden* policy, however, the link between anti-discrimination requirements and programming aired by religious licensees has been cut. The partial exemption permits religious licensees to use religious belief or affiliation as a BFOQ for on-air employees and others involved in the espousal of the licensee's religious views. Thus, the FCC has already determined that its programming diversity goal is insufficiently compelling to overcome the constitutional free speech and free exercise rights of religious broadcasters.

As a consequence, the only anti-religious discrimination requirement that remains is directed precisely to those employees who have no connection with the religious licensee's programming. Because these employees cannot affect the licensee's programming -- beneficially or otherwise -- the FCC has no authority to preclude a religious licensee from taking account of religious beliefs when choosing employees for non-programming-related positions. The Communications Act provides no additional authority for special broadcast-only EEO regulations.[39/] Accordingly, the *King's Garden* policy should be refashioned to conform to Congress' approach to the issue.[40/]

[38/](...continued)
"substantially related" to program diversity); *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993) (disapproving agency's long-standing ownership "integration" policy because predicted benefits were unsubstantiated).

[39/] To the contrary, the statute provides a caveat: the Commission's general rulemaking authority extends only to the degree that such regulations are "not inconsistent with law." 47 U.S.C. § 303(r).

[40/] As Congress has determined in the Title VII context, the type of restriction addressed in *King's Garden* misses the mark: "discrimination" by religious organizations on the basis of religious affiliation is inconsistent with other prohibited forms of discrimination. Unlike the other forms of discrimination condemned in both Title VII and the FCC's EEO rules -- (continued...)

B. Establishing an exemption permitting religious broadcasters to hire employees on the basis of religious belief or affiliation will not undermine the Commission's general EEO policies

The core concern of the Commission's EEO policies is race and sex discrimination, as is that of Title VII itself.[41] Religious entities covered under Section 702's religious discrimination exemption are still subject to EEO regulation concerning race and gender. A refashioned FCC exemption would operate similarly with respect to religious broadcasters.

Thus, an expanded exemption would not exempt religious broadcasters from seeking out, hiring, and promoting women and minorities who share the licensee's religious faith or affiliation. NRB has long supported the general thrust of the Commission's EEO regulations: to advance the employment opportunities in broadcasting for women and minorities. NRB members strive to practice what they preach.

Even if the *King's Garden* distinctions were eliminated, and religious broadcasters permitted to screen out all those who do not support their message, NRB does not believe

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[40](...continued)
race, color, national origin, and gender -- religious belief or affiliation is not an immutable trait. *See* 47 C.F.R. § 73.2080. It is both reasonable and appropriate to discourage discrimination that is based on physical characteristics or place of birth because no countervailing policy justification exists for making such distinctions. As described above in Section I, however, religious self-determination is a valid interest which government policymakers may accommodate.

[41] In contrast with its rules dealing with gender and rules, the FCC imposes no affirmative action obligation with respect to religious affiliation; licensees are not required to demonstrate that they have made efforts to attract and hire any target percentage of Presbyterians, Jews, or Muslims, for instance, as licensees must with respect to minorities and women. Nor has the Commission, to NRB's knowledge, ever suggested that station ownership should be diversified across sectarian lines.

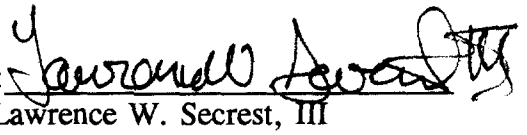
that many religious broadcasters would adhere to rigid denominational requirements in hiring. Instead, when they sought qualified employees -- including women and minorities -- most would simply look for individuals whose religious views are generally consonant with their own (and not limit themselves to members of a particular denomination or other narrowly defined religious group). Accordingly, the pool of potential employment candidates in the vast majority of cases will continue to be heterogeneous with respect to both gender and race. In these circumstances, there is little reason to fear that the proposed policy change would result in a decline in the actual patterns of hiring women and minorities at the affected stations. In any event, the FCC would retain power to sanction any broadcaster using the religious exemption as a subterfuge to discriminate against women or minorities in employment. Thus, the expanded exemption could not and should not shield any religious broadcaster that practices illicit discrimination against minorities or women.

CONCLUSION

The current *King's Garden* policy burdens the rights of religious broadcasters to self-determination and is not necessary to advance the Commission's core concern of fostering greater employment of minorities and women in broadcasting. Furthermore, the *King's Garden* restriction sharply contrasts with Congress' determination that government can and should accommodate these rights. The policy should be recast as a bright-line rule paralleling the treatment afforded religious entities under Title VII of the Civil Rights Act of 1964 -- thus allowing religious broadcasters to consider religious belief or affiliation in hiring or promoting any employee at their stations.

Respectfully submitted,

NATIONAL RELIGIOUS BROADCASTERS

By: 

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April 30, 1996

CERTIFICATE OF SERVICE

I, Rosemary C. Harold, hereby certify that copies of the foregoing "COMMENTS OF NATIONAL RELIGIOUS BROADCASTERS" were served via hand-delivery on this 30th day of April, 1996, to the following:

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